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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92060707
Party	Plaintiff Guess? IP Holder L.P.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Trademark Registration No. 4624401



For the Mark  
Registration Date of October 21, 2014

Guess? IP Holder L.P.

Petitioner,

v.

Knowluxe LLC

Registrant.

Cancellation No. 92060707

**OPPOSITION TO REGISTRANT'S  
MOTION TO DISMISS**

Petitioner, Guess? IP Holder L.P. (hereinafter "Guess" or "Petitioner"), opposes Registrant Knowluxe LLC's (hereinafter "Knowluxe" or "Registrant") Motion to Dismiss the above-identified Petition to Cancel under Federal Rule of Civil Procedure 12(b)(6) and Section 503 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"). For the reasons set forth below, Guess's Petition to Cancel sufficiently sets forth grounds for cancellation of Registrant's [INVERTED TRIANGLE DESIGN] mark, and therefore Registrant's Motion to Dismiss should be denied in its entirety.

**I. LEGAL STANDARD OF REVIEW**

Rule 8 of the Federal Rules of Civil Procedure ("FRCP") requires that pleadings setting forth claims for relief must include only "a short and plain statement of the claim showing the pleader is entitled to relief." Fed. R. Civ. P. 8(a). In order to withstand a Motion to Dismiss

based on Fed. R. Civ. P. 12(b)(6), the complaint need only allege such facts as would, if proved, establish that the Petitioner is entitled to the relief sought. Specifically, Petitioner need only establish that it has standing to maintain the proceeding and that a valid ground exists for cancelling the registration owned by the Registrant. *Young v. AGB Corp.*, 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998). To survive a Motion to Dismiss, a complaint must only "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007). See also *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (plausibility standard applies to all federal civil claims); *Doyle v. Al Johnson's Swedish Restaurant & Butik Inc.*, 101 USPQ2d 1780, 1782 (TTAB 2012) (citing *Ashcroft v. Iqbal* for the standard to determine whether a claim has been properly pleaded).

The motion to dismiss under FRCP 12(b)(6) may be granted only if, after accepting all well-pleaded allegations in the Petition to Cancel as true and drawing all reasonable inferences in favor of Guess, the Board finds that Guess has failed to set forth fair notice of its claim and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964 (2007). In this case, the Petition to Cancel will survive a motion to dismiss if it states plausible grounds for Guess's entitlement to the relief sought. *Id.* at 1965-66. The Petition to Cancel must merely contain sufficient factual allegations "to raise a right to relief above the speculative level." *Id.* at 1965. Accordingly, the issue before the Board upon consideration of the pending motion to dismiss is not whether Guess "will ultimately prevail but whether the claimant is entitled to offer evidence in support of the claims." *McDowell v. N. Shore-Long Island Jewish Health Sys., Inc.*, 839 F. Supp. 2d 562, 565 (E.D.N.Y.2012) (citing *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir.2001)). Whether Petitioner "can actually prove its allegations is a matter to be determined not upon motion to dismiss, but rather at final hearing or upon summary judgment after the parties have had an opportunity to submit evidence in support of their respective positions. *Cent. Mfg. Co. v. Outdoor Innovations, L.L.C.*, 1999 TTAB LEXIS 235 (TTAB 1999) (citing *Caron Corp. v. Helena Rubinstein, Inc.*, 193 USPQ 113 (TTAB 1976)). For this reason, a motion to

dismiss for failure to state a claim "is viewed with disfavor and is rarely granted." *Phonometrics, Inc. v. Hospitality Franchise Sys.*, 203 F.3d 790, 794 (Fed. Cir. 2000).

## **II. GUESS'S PETITION TO CANCEL SUFFICIENTLY ALLEGES LIKELIHOOD OF CONFUSION AS A GROUND FOR CANCELLATION**

In Registrant's Motion to Dismiss, Registrant incorrectly asserts Petitioner has failed to provide facts that support its allegation of likelihood of confusion in the Petition to Cancel. Notwithstanding this erroneous assertion, Guess's Petition to Cancel properly alleges numerous facts in support of its claim of likelihood of confusion. In particular, the Petition to Cancel states that Guess is the owner of at least seven (7) U.S. registrations for the trademarks based on an inverted equilateral triangle design, either alone or in combination with other terms and designs ("GUESS Inverted Triangle Design Marks"). Guess's Petition to Cancel also alleges that Guess has been continuously using one or more of the GUESS Inverted Triangle Design Marks "in connection with the sale of a variety of fashion and consumer products such as apparel, jewelry, watches, leather goods, eyewear, fragrances, stationery, bags, retail store services, and e-commerce" and "in connection with social networking sites, including Facebook and Twitter, and in connection with downloadable software in the nature of mobile phone applications for shopping and accessing social networks, as well as social media for the promotion and sales of its broad range of fashion and consumer products." The Petition to Cancel further alleges that Guess has been using the GUESS Inverted Triangle Design Marks in connection with the above-recited goods/services since long prior to Registrant's priority date for its [INVERTED TRIANGLE DESIGN] mark registration. Together, the existence of Petitioner's numerous GUESS Inverted Triangle Design Marks, the similarity of Registrant's [INVERTED TRIANGLE DESIGN] mark to Petitioner's GUESS Inverted Triangle Design Marks, and the alleged relatedness of the Parties' goods/services, constitute allegations sufficient to survive a motion to dismiss and are far more than mere conclusory statements, as erroneously suggested by Registrant.

To the extent Registrant suggests dismissal is appropriate because there is no likelihood of confusion as a matter of law, such assertions are proper only under a properly-supported motion for summary judgment under FRCP 56, not a motion to dismiss under FRCP 12(b)(6). *No Fear, Inc. v. United States DOL*, 1997 TTAB LEXIS 43 (TTAB Nov. 6, 1997) (Denying applicant's motion to dismiss an opposition to the mark NO SWEAT in connection with services for "promoting public awareness of the need for eliminating sweatshops in the garment manufacturing industry" based on the opposer's prior use and registration of the mark NO FEAR for clothing, stating "[i]f it is applicant's contention that it is entitled to a judgment of dismissal because there is no likelihood of confusion as a matter of law, that contention, in this case, must be asserted by way of a properly-supported motion for summary judgment under FRCP 56, not in a motion to dismiss under FRCP 12(b)(6).").

Moreover, "[a] party should not be denied his right to be heard . . . unless it is certain beyond any doubt that he cannot prevail under any circumstances." *Id.* (citing *Stabilisierungsfonds fur Wein v. Zimmermann-Graeff KG*, 199 USPQ 488, 489 (TTAB 1978)). As described above, Guess's Petition to Cancel clearly alleges facts which far exceed this standard. Accordingly, Guess should not be denied an opportunity to offer evidence in support of its likelihood of confusion claim.

In short, Guess's Petition to Cancel alleges facts which, if proved at trial or on summary judgment, would establish its priority and that a likelihood of confusion exists such that Guess would be entitled to the relief it seeks. No more is required under the notice pleading rules to withstand a motion to dismiss under FRCP 12(b)(6). Accordingly, Registrant's motion to dismiss this ground of the Petition to Cancel should be denied.

### **III. GUESS'S PETITION TO CANCEL SUFFICIENTLY ALLEGES DILUTION AS A GROUND FOR CANCELLATION**

In the Motion to Dismiss, Registrant contends that "Petitioner has not plausibly alleged a likelihood of dilution." Registrant is incorrect.

Despite Registrant's claim to the contrary, Guess's Petition to Cancel does sufficiently notify Registrant of the theory behind its dilution claim and the basic grounds upon which it is based.

Moreover, viewing Guess's allegations, that it has continuously and extensively used its GUESS Inverted Triangle Design Marks since long prior to Registrant's priority date for its [INVERTED TRIANGLE DESIGN] mark and that the GUESS Inverted Triangle Design Marks became famous in the United States and worldwide before that same priority date, in a light most favorable to Guess, it can be reasonably concluded and inferred that Guess has properly alleged a likelihood of dilution sufficient to support a Petition to Cancel.

Given the allegations made by the Petitioner in its pleading, a proper claim for dilution has been made. See *Trademark Trial and Appeal Board Manual of Procedure*, §503.02, pp. 321-322 ("Whenever the sufficiency of an complaint has been challenged by a motion to dismiss, it is the duty of the Board to examine the complaint in its entirety, construing the allegations therein so as to do justice, as required by Fed. R. Civ. P. 8(e), to determine whether it contains any allegations, which, if proved, would entitle the plaintiff to the relief sought"); *IdeasOne Inc. v. Nationwide Better Health*, 89 USPQ2d 1952, 1953 (TTAB 2009). Furthermore, Registrant cannot reasonably claim the Petition to Cancel does not place Registrant on notice of Guess's dilution claim because the Motion to Dismiss clearly demonstrates Registrant's appreciation of the elements that must be proven for a dilution claim, including that the GUESS Inverted Triangle Design Marks became famous before the priority date of Registrant's [INVERTED TRIANGLE DESIGN] mark.

**IV. IN THE ALTERNATIVE, GUESS REQUESTS LEAVE TO AMEND ITS  
PETITION TO CANCEL**

In the alternative, should the TTAB find that Guess's Petition to Cancel fails to properly state a claim for likelihood of confusion and/or dilution, Guess hereby requests leave to amend its Petition to Cancel pursuant to TBMP §503.03 to address any identified deficiencies.

**V. CONCLUSION**

For the foregoing reasons, Petitioner respectfully requests that the TTAB deny Registrant's Motion to Dismiss the Petition to Cancel pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

CHRISTIE, PARKER & HALE, LLP

Date March 4, 2015

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**CERTIFICATE OF ELECTRONIC TRANSMISSION AND SERVICE**

I certify that on March 4, 2015, the foregoing **OPPOSITION TO REGISTRANT'S MOTION TO DISMISS** is being electronically filed with the following:

United States Patent and Trademark Office  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

It is further certified that on March 4, 2015, the foregoing **OPPOSITION TO REGISTRANT'S MOTION TO DISMISS** is being served by mailing a copy thereof by United Parcel Service addressed to:

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